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PACIFIC TELESIS
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January 31, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: *CC Docket No. 96-238 - **Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers***

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of their *"Reply Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Denice Harris

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Internet: dharris@legal.pactel.com

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing	)	
Procedures to Be Followed when	)	
Formal Complaints Are Filed	)	
Against Common Carriers	)	
	)	

REPLY COMMENTS OF PACIFIC TELESIS GROUP

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Date: January 31, 1997

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REPLY COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group ("PTG") submits these Reply Comments in the above-captioned proceeding.

I. SUMMARY AND INTRODUCTION

The comments in this proceeding show that the Commission needs to be careful that the rule changes that it establishes not only expedite the complaint process but also protect the due process rights of all parties. In the current market and regulatory environment where customers are also competitors, the incorrect choice of rules could give an advantage to some competitors over others. The comments of some Competitive Local Carriers ("CLCs"), particularly MCI, indicate that they seek rule changes that will allow them to conduct fishing expeditions against incumbent LECs

and that will prevent LECs from being able to adequately defend themselves. The Commission should reject these proposals.

There is widespread agreement among the parties that the Commission should not jeopardize the rights of defendants to bring counterclaims and should protect the rights of all parties by allowing briefs in all complaint proceedings. Some parties, however, recommend counterproductive rules that would 1) turn pre-filing activities into fishing expeditions, 2) allow frivolous complaints based solely on information and belief, 3) put unreasonable and unnecessary burdens on defendants by decreasing their time to answer complaints at the same time that the burdens of answering are increasing, 4) allow amendments to complaints that remove the benefits of pre-filing activities and delay the process, and 5) allow Common Carrier Bureau resolution of complaints concerning interLATA authority under section 271, based on delegated authority, rather than requiring action by the full Commission.

The Commission should reject these latter five recommendations. Instead, the Commission should adopt rules, consistent with those that we recommended in our Comments, that balance expedition of complaints with protection of the rights of complainants and defendants. Carefully balanced rules will allow the Commission to meet its goals to "facilitate the full and fair resolution of complaints filed under the new statutory complaint provisions within the deadlines established by Congress" and "foster robust competition in all telecommunications markets."[1]

[1] *NPRM*, para. 2.

II. THE COMMISSION SHOULD ENSURE THAT PARTIES HAVE THE ABILITY TO FULLY AND FAIRLY PROSECUTE AND DEFEND CASES WITHIN THE DEADLINES ESTABLISHED BY CONGRESS (¶¶ 21-87)

A. Pre-filing Procedures And Activities Must Not Be Used To Force Carriers To Either Open All Their Files To Their Competitors Or Be Penalized In The Complaint Process (¶¶ 27-29)

Under MCI's (pp. 6-8) recommendations, an ILEC would be subject to any and all information requests from customers/competitors during the pre-filing period. If the ILEC did not provide the information, it would be punished by having presumptions placed against it in the complaint process, which "would justify the other party's failure to meet a corresponding pleading requirement." MCI, p. 7. For instance, the customer/competitor could bring a complaint based solely on information and belief. MCI, pp. 7-8. At that point, it could demand discovery of the information, without ever having made any factually supported allegation against the ILEC based on personal knowledge of the complainant or its employees.

MCI intends to use these pre-filing tactics particularly in the "Section 251/252 context, in which competitive local service providers will be negotiating or arbitrating a wide range of issues with ILECs." MCI, p. 9. MCI's proposal is nothing more than a bald attempt to open the files of ILECs that it competes with in order to conduct fishing expeditions. With or without a confidentiality agreement, no citizen can be subject to unwarranted exposure of its documents and other possessions.

If, contrary to our recommendation, the Commission were to adopt a pre-filing discovery requirement such as the one MCI proposes, the Commission also would have to establish due process protections during the pre-filing period that mirror

those in the complaint process. For instance, the Commission would have to require that the requesting customer/competitor state its claim and would have to allow the ILEC to file a motion objecting that the customer/competitor had failed to state a claim. The Commission also would have to allow the ILEC to object to a document request as requiring the production of irrelevant information. Without these protections, under MCI's proposal the ILEC could still refuse to produce the information, but would then be subject to punitive presumptions against it in the complaint process. That would make a mockery of the complaint process and the due process rights of ILECs.

In an attempt to demonstrate the need for strict standards for pre-filing activities, MCI mischaracterizes Pacific Bell's activities. Concerning issues that ended up in a complaint that MCI filed at the California Public Utilities Commission,[2] MCI (p. 9) states, "In that case, Pacific Bell never responded to MCI's request to address these issues." In fact, subsequent to receipt of MCI's written request[3] and prior to MCI's filing the complaint a month later, Pacific Bell responded to MCI by letter dated December 3, 1996, explaining that Pacific Bell was investigating the matters, would take corrective action if it was found to be needed, and would conclude the investigation in about two weeks and report findings to MCI at that time.[4] MCI filed a complaint eight days later,

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[2] *MCI Telecommunications Corporation (U 5001 C) v. Pacific Bell (U 1001 C) and Pacific Bell Communications*, Dkt. C. 96-12-026 (Cal. PUC, filed Dec. 11, 1996).

[3] Letter from Nate Davis, Senior Vice President Local Markets, MCI Telecommunications Corporation, to David W. Dorman, CEO and President Pacific Bell, November 11, 1996. This letter contained eight pages of voluminous allegations, many of which were vague and difficult or impossible to investigate without more information, concerning complex matters.

[4] Letter from Elizabeth A. Fetter, President Industry Markets Group, Pacific Bell, to Nate Davis, Senior Vice President Local Markets, MCI, December 3, 1996.

on December 11, 1996, without waiting a few more days for our report.[5] Thus, MCI's allegation that we did not respond is wrong, and its actions evidenced a desire to thwart the pre-filing resolution process. The Commission should reject MCI's allegations and recommendations.

B. It Is Proper To Require Complainants To Undertake Certain Pre-filing Activities

AT&T (p. 6) objects to the Commission's proposed requirement that complainants certify they have discussed, or attempted to discuss, settlement with defendants as a condition to filing a complaint. AT&T states that such a pre-filing requirement "would be an improper restriction on a party's unconditional statutory right to file a complaint." AT&T's sole authority for this argument is *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973). That case, however, concerned the Commission's prohibition on tariff revisions for certain services, unless authorized by special permission of the Commission. *Id.* at 869. Here the Commission would not be prohibiting complaints, but would be reasonably implementing the complaint provisions of the Act by requiring

[5] We provided this report in a letter from J. R. Sinn, Vice President Customer Service Industry Markets Group, to Nate Davis, Senior Vice President Local Markets, MCI, December 19, 1996. This letter responded to MCI's allegations by explaining problems, MCI's contribution to those problems, and our proposed solutions. In addition to the letters described herein, Pacific Bell had been working regularly with MCI to resolve issues, and conducted training sessions. The recent changes in regulation and the industry have required retraining service representatives and changing systems, and we have had ongoing discussions with MCI on these matters. Moreover, many of the issues raised by MCI in its November 11, 1996 letter were items in ongoing discussions in negotiations between MCI and Pacific Bell concerning creation of an Interconnection Agreement. These issues included movement of customers without service interruptions, operating practices, and service order backlogs. MCI and Pacific Bell now have a California PUC approval Interconnection Agreement.

certain pre-filing activities. In order to ensure that the requirement to conduct or attempt settlement discussions never prohibits a complaint, the complainant should be allowed to provide a full justification with its complaint of why it was unable to conduct or attempt settlement discussions or of why it was unable to give the 30-day pre-filing notice that we recommended in our Comments.[6]

C. Complaints Based Solely On "Information And Belief" Should Be Dismissed (¶ 38)

A number of CLCs and resellers oppose any restriction against bringing complaints based solely on "information and belief."[7] Their opposition should be rejected. Now that so many customers of the LECs are also competitors, it is essential that the Commission prohibit such complaints. In order to reduce the number of frivolous complaints, including those brought to harass defendants or as fishing expeditions, a complainant should be required to make some allegations based on its own or an employee's personal knowledge.

D. 20 Days Is Not Enough For A Full And Fair Answer (¶47)

Several CLCs and resellers also recommend that the time for answers be shortened from 30 to 20 days.[8] None of these parties show, however, that 20 days is adequate for answers or that decreasing the time for answers by 10 days would be of significant help in streamlining the complaint process or meeting Congressional deadlines. MFS (p. 9) states, "Under the Federal Rules of Civil Procedure, parties must

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[6] PTG, p. 5.
[7] ACTA at 4, CompTel at 6, MCI at 10, MFS at 6, Teleport at 2, TRA at 13.
[8] ACTA at 5, AT&T at 11, MCI at 17, MFS at 9, TRA at 15.

answer a complaint 20 days after service and most parties easily comply with that deadline." That comparison is misplaced. The Federal Rules require mere "notice" pleadings, and, unlike the Commission's proposals, disclosure of individuals and documents occurs much later -- as much as 86 days after the answer.[9]

Reducing the time to answer is not the solution to streamlining complaints. Rapid but fair resolution of complaints depends on the defendant being able to fully respond up-front, which will help avoid confusion and delays in the Commission's subsequent decision process.

E. The Commission Should Not Require Counterclaims To Either Be Filed With The Answer Or Be Barred (¶¶ 70-71)

A number of parties oppose any requirement that would force a defendant to either file a counterclaim arising out of the same subject matter as the complaint concurrently with the answer or have the counterclaim be barred.[10] We agree with these parties that there is no need for such a rule and that it would be overly burdensome on defendants because it would be in addition to the other burdens that the Commission has proposed to add to the requirements for answers.

F. The Complainant Should Be Prohibited From Introducing New Causes Of Action In The Same Complaint Proceeding (¶ 78)

MCI (p. 23) states that a complainant often is unable to assert, "or even be aware of, all of the claims it has against the defendant...." MCI wants to be able to amend the complaint to add new causes of action in the same proceeding as it goes

[9] Fed.R.Civ.P.26(a)(1) and (f) and Rule 16(b).
[10] *See, e.g.*, AT&T at 11-12, BellSouth at 18, NYNEX at 14.

along. MCI could use this approach as a vehicle to continually expand discovery to involve new issues not included in the complaint. MCI's proposed approach is inconsistent with a fair, impartial, and speedy complaint process. It would consist of a fishing expedition in which the complainant does not really have a complaint, but is looking for one. Continually starting the process over based on new claims in the same proceeding would destroy the value of pre-filing activities and would be inconsistent with the Commission's goal to expedite complaints. The Commission should reject MCI's proposal and limit both the complaint and discovery to the causes of action in the initial complaint.

G. Briefs Should Be Allowed In All Complaint Proceedings (¶ 81)

There is widespread support for continuing to allow briefs regardless of whether or not discovery is performed.[11] Briefs are essential to protect the rights of parties to adequately present their cases. Moreover, the parties' analyses of the relationship of the relevant facts to the applicable law in briefs will help the Commission decide complaints expeditiously.

H. The Nature Of Delegated Authority Should Not Change (¶¶ 86-87)

There is debate among the parties as to whether the Bureau may "act on" complaints under § 271(d)(6)(A).[12] Regardless of the Commission's statutory interpretation, the Commission should not change the nature of its delegations to the

[11] ACTA at 9, AT&T at 18, BellSouth at 20, CompTel at 11, GTE at 16, ICG at 24, MCI at 24, MFS at 22, PTG at 31-32, Sprint at 9.
[12] See, e.g., BellSouth at 21, CompTel at 22, MFS at 24, and Southwestern Bell at 14.

Bureau. The Commission should continue to prohibit delegated authority "to designate for hearing any formal complaints which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents or guidelines...."[13] For some time to come, questions of whether a BOC has continued to meet the requirements of § 271 will present novel questions of fact, law, or policy, and should be decided by the full Commission.

I. The Commission Should Safeguard Parties' Rights In Complaints Brought Under §§ 251 and 252 And Respect The Strict Limits On Its Review

MCI (p. 5) states that the Commission should apply to all formal complaints arising under §§ 251 or 252 the same 90-day deadline as Congress applied to § 271(d)(6) complaint cases. The Commission should reject this proposal. If Congress had intended to place the same deadline on §§ 251 and 252 complaints as on § 271 complaints, it would have done so. The Commission should retain the flexibility that Congress allowed concerning §§ 251 and 252 complaints, with the goal of moving them forward quickly while protecting the rights of all parties.

In addition, the Commission must respect the strict limits on its review of complaints under §§ 251 and 252, which MCI ignores. In its *First Report and Order* in CC Docket No. 96-98, the Commission stated concerning §§ 251 and 252 complaints that it "would not be directly reviewing the state commission's decision, but rather, our

[13] 47 CFR § 0.291(d)&(e).

review would be strictly limited to determining whether the common carrier's actions or omissions were in contravention of the Communications Act."[14]

Moreover, the Commission stated, "We are unlikely, in adjudicating a complaint, to examine the consistency of a state decision with sections 251 and 252 if a judicial determination has already been made on the issues before us."[15] This limitation is proper and is contrary to MCI's recommendation that the Commission resolve local competition issues in 60 days "where an administrative or judicial record already exists with regard to a formal complaint proceeding by virtue of a prior proceeding." MCI, p. 5. Where there has been a prior judicial determination, the Commission intends to avoid interfering with it. In addition, whether a State determination is judicial or administrative, the Commission's authority is limited by § 2(b) of the Act, which leaves regulation of intrastate service to the states. In any event, the Commission certainly should not place a 60 day time limit on any complaints. It will be difficult enough to meet the Congressional deadlines, while protecting parties' due process rights, without creating even more stringent deadlines.

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[14] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *First Report and Order*, Released August 8, 1996, para. 128 (emphasis added).

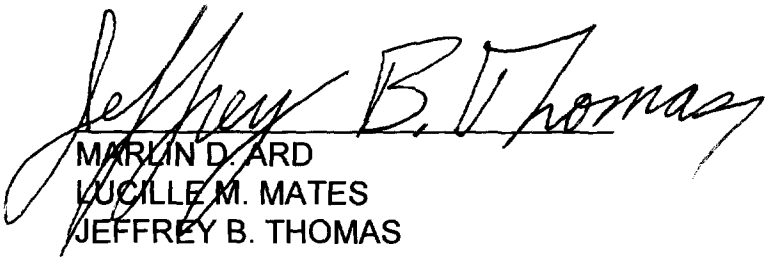
[15] *Id.*

III. CONCLUSION

The Commission should adopt rules in accord with the recommendations in our Comments and Reply Comments in order to meet the Commission's goals to facilitate a full and fair resolution of complaints within the deadlines established by Congress and to foster robust competition in all telecommunications markets.

Respectively submitted,

PACIFIC TELESIS GROUP



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Date: January 31, 1997

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